IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.693 OF 2004
IN
WRIT PETITION NO.1947 OF 2003

M/s.Cable Corporation of India ....Appellant
Ori.Respdt.2

V/s.

1. Additional Commissioner of Labour ..Respondent No.1

2. Engineering Mazdoor Sabh ..Respondent No.2
Ori.Petitioner

3. Shramik Utkarsha Sabha ..Respondent No.3
Ori.Respdt.No.3

Mr.K.K. Singhvi, Senior Counsel with Mr.Soli Cooper with Ms.E. Pereira i/b Mr.R.V. Paranjape for the Appellant.

Mr.P.M. Mokashi, A.G.P. for Respondent No.1.

Mr.J.P. Cama, Senior Counsel with Mr.Akhtar Shaikh i/b M/s.Sanjay Udeshi & Co. for Respondent No.2.

Mr.P.M. Palshikar for Respondent No.3.

CORAM:A.P.SHAH AND S.J.VAZIFDAR, JJ.
DATED : 5TH APRIL, 2005.

ORAL JUDGMENT (PER A.P. SHAH, J.) :

l. The ambit and scope of section 25-N(6) of the Industrial Disputes Act, l947 (hereinafter called the Act), falls for consideration in this appeal

which is directed against the judgment of a learned single Judge in Writ Petition No.l947 of 2003. The question is whether once a review application is rejected, the appropriate Government/ specified authority is precluded from making a reference for adjudication under section 25-N(6) of the Act. The circumstances under which the question arises for our determination need brief notice at the threshold.

2. The appellant company was established in l957 for the manufacture of high voltage electric cables and wires.The company has manufacturing units at Borivli and Nasik. In the present case we are concerned with the company's unit at Borivli. The company made an application under section 25-N(2)to the specified authority on l6.l.2003 to retrench 280 workmen out of 509 workmen working at its Borivli Unit. The specified authority, after giving an opportunity of being heard to the company, workmen and other interested persons, including workers unions and after conducting an inquiry, by a reasoned order dated 29.4.2003 partly allowed the application preferred by the company by granting permission to retrench 276 workmen out of 509 workmen on conditions mentioned in the order. The

correctness of that decision was put in issue by the workers unions, the respondent nos. 2 and 3 herein, by filing applications under section 25-N(6) of the Act for review of the decision or to refer the matter for adjudication. By an order dated 9.7.2003 the applications preferred by the Unions were rejected on the ground that such applications could be preferred only by workmen whereas the same have been made by the Unions. Besides it was observed that no new point was raised in the review proceedings which warranted examination. Accordingly both the applications for review/reference came to be rejected.

3. The aforesaid order of the specified authority was challenged through Writ Petition No. l947 of 2003 by the 2nd respondent union, which came to be partly allowed by the learned single Judge vide order dated 2.8.2004.The learned single Judge held that finding of the specified authority that unions had no locus as all the aggrieved workmen were not made parties to the application was contrary to law laid down by the Supreme Court in The Mumbai Kamgar Sabha, Bombay vs. M/s Abdulbhai Faizullabhai and ors, l976 SC l455. The learned single Judge further held that the right of review is possible only on

limited grounds and since no new points have been raised by the unions, the prayer for review was rightly rejected. The learned single Judge relying upon the judgment of a Division Bench of Gujarat High Court in Rajya General Kamgar Mandal and ors vs. Vice President, Packart Press Div Ambalal Sarabhai Enterprises, Baroda and ors, l995 II CLR 6l3 further held that merely because review application is rejected, reference cannot be said to be barred under section 25-N(6) of the Act and, accordingly directed the specified authority to refer the matter for adjudication to the industrial tribunal in accordance with section 25-N(6) of the Act.

4. Mr.K.K.Singhvi, learned senior counsel appearing for the company strenuously contended that sub-section (6) of section 25-N provides option of approaching the appropriate Government/specified authority to either review its order granting or refusing to grant permission under sub-section (3) of section 25-N or to refer the matter to the tribunal for adjudication. Mr.Singhvi urged that the reference is not in the alternative to review and, therefore, once review application is rejected, the party has no right to a reference. He submitted

that in the present case, the unions having exercised their option of seeking review of the order dated 29.4.2003 before the specified authority and after having given full opportunity of being heard,the said review application having been rejected, the question of thereafter making a reference to the tribunal would not arise and the order of the learned single Judge directing a reference is contrary to the plain language of section 25-N(6) of the Act. On the contrary, Mr. Cama,learned senior counsel appearing for the 2nd respondent union submitted that even if the authority did not think it fit to interfere with the request for review of the order according permission for the proposed retrenchment, even in that case it was necessary for the authority to make reference for adjudication. According to Mr. Cama though legislation has used the words " may review or refer the matter to the Industrial Tribunal for adjudication" in the context of Chapter V-B of the Act the word "may" will have to be read as "shall". The learned counsel submitted that the object of making the aforesaid provision in the sub-section is to provide an adjudication forum to a party who is aggrieved by the refusal or grant of permission for retrenchment and which order is not being reviewed.

If the authority rejects the application of the workmen,workmen must have a remedy in built in the statute itself and hence sub-section will have to be read as providing for a reference for adjudication to the industrial tribunal. According to Mr Cama any interpretation to the contrary will result into a situation where a forum which is created under the statute will be denied to the party on the specified authority repeating its earlier decision in a review.

Both the learned counsel relied upon authorities,which will be adverted to in the course of discussion.

5. Section 25-N forms part of Chapter V-B which bears the heading "Special provisions relating to lay-off, retrenchment and closure in certain establishments". The said Chapter consists of sections 25-K to 25-S and was inserted by the Industrial Disputes (Amendment) Act, l976 (Act No.32 of l976) with effect from 5.3.l976. Section 25-K, as originally enacted, confined the applicability of the provisions of Chapter V-B to industrial establishments in which not less than 300 workmen were employed on an average per working day

for the preceding twelve months. Section 25-M makes provision for prohibition of lay-off.Section 25-N prescribes the conditinos precedent to retrenchment of workmen. Section 25-0 prescribes the procedure for closing down an undertaking. Section 25-Q imposes the penalty on the employer for contravention of the provisions of sections 25-M or section 25-N. Rest of the provisions are not material for the purpose of this petition.

6. The validity of section 25-N was challenged before the various High Courts and there was a conflict of opinion amongst the High Courts. A Division Bench of the Andhra Pradesh High Court upheld the validity of section 25-N,while a Division Bench of Madras High Court and a Full Bench of Rajasthan High Court took a contrary view and held section 25-N to be violative of the right guaranteed under Article l9(l)(g) of the Constitution imposing unreasonable restrictions on the said right of the employer. The Madras High Court and Rajasthan High Court placed reliance on the decision of the Supreme Court in Excel Wear etc vs Union of India and ors,l978 II LLJ 527 and held that the reasons for which the Supreme Court has struck down section 25-0 are equally applicable for judging the validity of

section 25-N.

7. In the case of Excel Wear etc vs. Union of India and ors, (supra) the Constitution Bench of the Supreme Court held that the fundamental right to carry on a business guaranteed under Article l9(l)(g) of the Constitution includes the right to close it down when it becomes necessary to do so. The Court held that "the right to close a business is an integral part of the fundamental right to carry on a business. But as no right is absolute in its scope, so is the nature of this right. It can certainly be restricted, regulated or controlled by law in the interest of the general public (paragraph 2l)". In Paragraph 20, however, the Court noted the observations of the Supreme Court made earlier in Narendrakumar vs Union of India, AIR l960 SC 430 and quoted the same as follows: "The greater the restrictions, the more the need for strict scrutiny by the Court". In paragraph 22 of the judgment,a reference was made to the various submissions made on behalf of the employers. One very relevant submission, namely submission (viii), was that "there is no provision of appeal, revision or review of the order even after sometime". Accepting the said submission and noting that no remedy existed in

the section as it then stood,the Supreme Court observed in paragraph 27 as follows:

> "27. The order passed by the authority is not subject to any scrutiny by any higher authority or tribunal either in appeal or revision. The order cannot be reviewed either. We are again asked to read into the provisions that successive applications can be made either for review of the order or because of the changed circumstance. But what will the employer do even if the continuing same circumstances make it impossible for him to carry on the business any longer ? Can he ask for a review?

The Court further observed at the end of paragraph 30 as follows:

> "What we are concerned with the present juncture is to see whether the law as enacted suffers from any vice of excessive and unreasonable restriction. In our opinion it does suffer".

The other relevant submission was submission No(xv),

namely that "reasonableness of the impugned restrictions must be examined both from the procedural and substantive aspects of the law." The Supreme Court accepted the said submission quoting with approval in paragraph 3l of the earlier observations in State of Bihar vs K K Mishra, AIR l97l SC l667.

8. After the decision of the Supreme Court in Excel Wear case (supra) the Parliament enacted the Industrial Disputes (Amendment) Act, l982 (Act No. 46 of l982) whereby section 25-0 was substituted. By the said Act, amendments were also made in sections 25-K and 25-R. As a result of the amendment made to section 25-K the number of workmen required for applicability of the provisions of Chapter V-B to an industrial establishment was reduced from 300 to l00. Under new section 25-0 the order of the Government granting or refusing permission for closing is made final subject to a review by the Government or a reference to the industrial tribunal. In l984 the Parliament enacted Industrial Disputes (Amendment) Act, l984 whereby section 25-N was substituted and amendment was also made to section 25-Q. The new section 25-N is in substance akin to new section 25-0. At this stage

it would be useful to compare section 25-N as it stood before the amendment and amended one. The section prior to its amendment and after its amendment read as follows:

Old section 25-N

> **25N. Conditions precedent to retrenchment of workmen** - (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until, -
>
> (a) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
>
> Provided that no such notice shall be necessary if the retrenchment is under an agreement, which specifies a date

for termination of service;

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and

c) notice in the prescribed manner is served on the appropriate Government by notification in the Official Gazette, and the permission of such Government or authority is obtained under sub-section (2).

2) On receipt of a notice under clause (c) of sub-section (l) the appropriate Government or authority may, after making such enquiry as such Government or authority thinks fit, grant or refuse, for reasons to be recorded in writing, the permission for the retrenchment to which the notice relates.

(3) Where the Government or authority does not communicate the permission or the refusal to grant the permission to the employer within three months of the date of service of the notice under clause (c) of sub-section (l), the Government or authority shall be deemed to have granted permission for such retrenchment on the expiration of the said period of three months.

(4) Where at the commencement of the Industrial Disputes (Amendment) Act, l976, the period of notice given under clause (a) of section 25-F for the retrenchment of any workman has not expired, the employer shall not retrench the workman but shall, within a period of fifteen days from such commencement, apply to the appropriate Government or to the authority specified in sub-section (2) for permission for retrenchment.

5) Where an application for permission has been made under sub-section (4) and the appropriate Government or the authority, as

the case may be, does not communicate the permission or the refusal to grant the permission to the employer within a period of two months from the date on which the application is made, the permission applied for shall be deemed to have been granted on the expiration of the said period of two months.

(6) Where no application for permission under clause (c) of sub-section (l), is made, or where no application for permission under sub-section (4) is mad within the period specified therein or where the permission for the retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.

7) Where at the commencement of the Industrial Disputes (Amendment) Act, l976, a dispute relating, either solely or in

addition to other matters, to the retrenchment of any workman or workmen of an industrial establishment to which this Chapter applies is pending before a conciliation officer or the Central Government or the State Government as the case may be, and-

a) there is an allegation that such retrenchment is by way of a victimization; or

b) the appropriate Government is of the opinion that such retrenchment is not in the interest of the maintenance of industrial peace;

the appropriate Government, if satisfied that it is necessary so to do, may, by order, withdraw such dispute or, as the case may be, such dispute in so far as it relates to such retrenchment and transfer the same to an authority (being an authority specified by the appropriate Vovernment by notification in the Official Gazette) for consideration whether such

retrenchment is justified and any order passed by such authority shall be final and binding on the employer and the workman or workmen".

New section 25-N

25N. Conditions precedent to retrenchment of workmen - (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until, -

(a) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and

(b) the prior permission of the appropriate Government or such authority as may be specified by that

Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf.

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being beard to the employer, the workmen concerned and the person interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and

for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where an application for permission has been made under sub-section (1) and the appropriate Government or the specified authority does not communicate the order granting or refusing to grant permission to the employer within a period of sixty days from the date on which such application is made, the permission applied for shall be deemed to have been granted on the expiration of the said period of sixty days.

(5) An order of the appropriate Government or the specified authority granting or refusing to grant permission shall, subject to the provisions of sub-section (6), be final and binding on all the parties concerned and shall remain in force for one year from the date of such order.

(6) The appropriate Government or the specified authority may, either on its own motion or on the application made by the employer or any workman, review its order granting or refusing to grant permission under sub-section (3) or refer the matter or, as the case may be, cause it to be referred, to a Tribunal for adjudication:

Provided that where a reference has been made to a Tribunal under this sub-section, it shall pass an award within a period of thirty days from the date of such reference.

(7) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.

(8) Notwithstanding anything contained in the foregoing provisions of this section, the appropriate Government may, if it is satisfied that owing to such exceptional circumstances as accident in the establishment or death of the employer or the like, it is necessary so to do, by order, direct that the provisions of sub-section (1) shall not apply in relation to such establishment for such period as may be specified in the order.

(9) Where permission for retrenchment has been granted under sub-section (3) or where permission for retrenchment is deemed to be granted under, in sub-section (4), every workman who is employed in that establishment immediately before the date of application for permission under this section shall be entitled to receive, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months.

9. When section 25-N as it stood prior to its amendment is compared with the section after its amendment, it is seen that in the amended section salient changes have been brought out. Thus under the amended sub-section (2)every employer is required to make an application to the appropriate Government/ specified authority in the prescribed manner stating the reasons for the retrenchment and a copy of such application is also required to be served simultaneously on the workman concerned in the prescribed manner. Under sub-section (3) certain guidelines have been provided with respect to the inquiry to be conducted by the State Government while considering the application for closure and (i) genuineness and adequacy of the reasons for closure, (ii) interest of general public and (iii) all other relevant factors are to be borne in mind while deciding the application, which has to be decided after giving reasonable opportunity of being heard to the employer, the workmen and also to the persons interested in such retrenchment, which is an additional category mentioned in this sub-section . New sub-section (4) in the amended section, is by and large on par with the original sub-section (5) which provides that if the application is not decided within the time of sixty

days, stipulated therein, the permission shall be deemed to have been granted. Amendments to sub-sections (5) and (6) bring about change in view of the decisions of the Supreme Court in Excel Wear case namely to provide a remedy where the application for retrenchment is decided one way or the other. New sub-section (5) provides that the order of the appropriate Government or specified authority granting or refusing to grant permission is final and binding on the parties, subject to the provisions of sub-section (6). However,as provided in sub-section (5) such order shall remain in force for a period of one year from the date of the order. Sub-section (6) provides that the appropriate Government/ specified authority may review its order granting or refusing to grant permission either suo moto or on application made to it by the employer or any workman or refer the matter to the industrial tribunal for its adjudication. When the reference is made, the tribunal is required to make an order within 30 days from the date of reference.

l0. The scope of review is not spelt out in the section. Though in a review the appropriate Government will have to make an inquiry into all necessary facts, particularly into the genuineness

and adequacy of the reasons stated by the employer, workmen and all interested persons, nevertheless the scope of review is limited to the question whether the order under review was correctly passed. An adjudication, on the other hand would require the tribunal to assess the genuineness of the evidence before it and on the material placed before it, it would arrive on a preponderance of probabilities to a conclusion whether the permission ought to be granted or not. The tribunal when conferred with the power of adjudication in terms of sub-section (6) is not trimmed by the limitation as contained in sub-section (2). It has to answer the reference made to it and the reference made to it cannot be limited to the question whether the permission granted by the appropriate Government is good or bad. Therefore the application under sub-section (2) for retrenchment itself comes under the scrutiny of the tribunal (See Britania Industries Limited vs Maharashtra General Kamgar Union and anr, 2005 (l) CLR 278 and Voltas Employees Union vs. Voltas Limited and ors, 2002 (2)CLR l40. The intention of the Parliament in making the aforesaid provision in sub-section (6) is to provide adjudication forum to the applicant who is aggrieved by the refusal or grant of permission for retrenchment. If we accept

the submission of Mr. Singhvi that the two remedies in the said section are alternative to each other, it will result in a situation wherein the forum of adjudication will be denied to the party on the Government's rejecting the review and confirming its order. It is also seen that the right to apply for the review is restricted not only to the employer or workmen but also is retained by the Government itself. Accepting Mr.Singhvi's interpretation would mean that if Government reviews its order on its own motion the aggrieved party would not be able to prefer either of the remedies provided under sub-section (6). The section, therefore, will have to be harmoniously construed and it would be necessary to read into sub-section that this review will necessarily mean taking another view or alternate view of the matter on merits. In case the authority declines to accept the review for want of new or additional material, sub-section provides for the aggrieved party the adjudication forum by way of reference to the industrial tribunal. Any other interpretation will make the remedy otiose.

ll. Mr Singhvi submitted that this interpretation would not be correct as it implies that the statute compels the appropriate Government to decide the

application in a particular manner, namely, to set aside the decision taken under sub-section (3). The falacy in this submission lies in not following through the entire scheme, under sub-section (6). The provision properly construed does not compel the appropriate Government to decide in a particular manner. It does not compel the appropriate Government to review the decision. The appropriate Government may decide one way or the other, to wit, it may either review or refuse to review the decision taken under sub-section (3). However, if the appropriate Government decides not to review the order then it is bound to refer the matter to the tribunal for adjudication on the application of the aggrieved party. It is clear, therefore, that the provision of sub-section (6) do not compel the appropriate Government to decide in a particular manner.

l2. Having come to the conclusion that the term review in section 25-N(6) connotes taking another view or alternate view the order under section 25-N(3) the question of reading the term "or" as "and" in sub-section (6) does not arise. This question would have arisen only if we had come to the conclusion that the term review connotes merely

the process of decision-making in an application for review and not the decision reviewing the order itself. The view taken by us is supported by judgment of a Division Bench of the Gujarat High Court and by the judgment of a Division Bench of Kerala High Court which we shall refer to shortly. But before that we may refer to the judgments of the Constitution Bench of the Supreme Court in Workmen of the Meenakshi Mills Ltd etc vs Meenakshi Mills Ltd and anr etc., AIR l994 SC 2696 and M/s Orissa Textile and Steel Ltd vs State of Orissa and ors, AIR 2002 SC 708.

l3. In the case of Workmen of the Meenakshi Mills Ltd etc. vs Meenakshi Mills Ltd and anr etc, the Constitution Bench in the context of unamended provisions of section 25-N observed as follows:

> "... what remains to be considered is whether an industrial dispute can be raised and it can be referred for adjudication in a case where the appropriate government has either granted permission for retrenchment or has refused such permission under sub-section (2) of section 25-N. Since there is no provision similarly to that

contained in sub-section (7) of section 25-N attaching finality to an order passed under sub- section (2), it would be permissible for the workmen aggrieved by retrenchment effected in pursuance of an order granting permission for such retrenchment to raise an industrial dispute claiming and it would b permissible for the appropriate government to refer such dispute for adjudication though the likelihood of such dispute being referred for adjudication would be extremely remote since the order granting permission for retrenchment would have been passed either by the appropriate government or authority specified by the appropriate government and reference under section l0 of the Act is also to be made by the appropriate government".

14. In M/s Orissa Textile and Steel Limited vs State of Orissa and ors, the Constitution Bench held that the word "may" appearing in sub-section (5) of section 25-0 will have to be read as "shall" and the appropriate Government is duty bound to review its

order upon an application made by the employer or the workmen. Similarly if so required by the employer or the workmen the appropriate Government shall refer the matter to the tribunal for adjudication. Variava J speaking for the Bench observed:

> "l4. Further sub-section (5) of the amended section 25-O provides that the appropriate government may, either on its own motion or on an application made by the employer or any workman, review its order granting or refusing permission or refer the matter to a tribunal for adjudication. It has also been provided that if a reference is made to a tribunal (under this sub-section) then the tribunal should pass is award within a period of 30 days from the date of such reference. Counsel for the employers submitted that it is left to the discretion of the appropriate government to either review or make a reference . They submitted that there is no right in the employer to compulsorily seek a review or a reference. The learned Attorney General, fairly submitted that the

word "may" in sub-section (5) of the amended section 25-O should be read as "shall". He further submitted that the "review" would necessitate the making of an enquiry into all relevant facts, particularly the genuineness and adequacy of the reasons stated by the employer, and the giving of an opportunity of being heard. He submitted that even though sub-section (5) of amended section 25-0, does not lays down any time limits within which the review was to be disposed of, a proper reading of the section would necessarily imply that a review would have to be disposed of within a period of 30 days from the date on which an application for review was made.....

In our view, the learned Attorney General is right. A proper reading of sub-section (5) of amended section 25-0 shows that, in the context in which it is used, the word "may" necessarily means "shall".Thus the appropriate government "shall" reviews the order if an application in that behalf s made by the employer or the workmen.

Similarly, if so required by the employer or the workman, it shall refer the matter to a tribunal for adjudication. As submitted by the learned Attorney General, in a review the appropriate government would have to make an enquiry into all necessary facts particularly into the genuineness and adequacy of the reasons stated by the employer, workmen and all interest persons. The order on review would have to be in writing giving reasons. Thus, in exercising powers of review, the appropriate government would be performing quasi judicial functions. Sub- section (5) of amended section 25-0 provides that the Award should be passed within a period of 30 days from the date of reference. Even tough it does not provide any time frame within which the review is to be disposed off, it is settled law that the same would have to be disposed of within a reasonable period of time. In our view a period of 30 days would be a reasonable period for disposing of a review also. This review and/or reference under amended section 25-0 would be in addition to a judicial review

> under Art 226 or Art 32. in Meenakshi Mills' case it has been held that the exercise of power being qusi judicial the remedy of judicial review under Art 226 or Art 32 was an adequate protection against the arbitrary action in the matter of exercising of power by the appropriate government. We are in full agreement with those observations".
>
> (emphasis supplied)

l5. In Rajya General Kamgar Mandal and ors vs Vice President Packart Press Div Ambalal Sarabhai Enterprises, Baroda and ors (supra) a Division Bench of Gujarat High Court held that the rejection of the review application would not bar the aggrieved party from making a reference for adjudication. In that case the specified authority granted the application under section 25- O permitting closure of the unit. The workers Union preferred an application for review of the order and that application came to be rejected. This order was challenged by filing a writ petition in the High Court. In the writ petition, the matter was remanded to the specified authority with direction to reconsider the decision

on the application for review afresh. The specified authority again rejected the review application and confirmed its earlier order. By the same order it also declined to refer the matter to the tribunal for adjudication. Allowing the writ petition the Division Bench held as under:

> "11. ..... The section therefore, will have to be harmoniously construed and hence it becomes necessary to read into the sub-section that this review will necessarily mean taking another view or alternative view on the matter on merits. In case the authority is not inclined to review the order, the sub-section provides that the authority may refer the matter to the Industrial Tribunal for adjudication. The sub-section undoubtedly states that the appropriate Government may review or refer the matter to the Industrial Tribunal for adjudication. However in the context of the above discussion "may" will have to be read as "shall". The idea in making the aforesaid provision in the sub-section is to provide an adjudication forum to the applicant who is aggrieved by the refusal

or grant of the permission for closure and which order is not being reviewed. Looking at it from the view point of the employer it is clear that he is required to apply for the prior permission for the closure of the undertaking only because of this provision under the Act, in the absence of which he was not required to apply to any authority for the closure of his undertaking. After he so applies he tries to satisfy the appropriate authority under sub-section (2) with respect to his reasons in support thereof. If the authority rejects the application of the employer, the employer must have a remedy in built in the statute itself and hence this sub-section will have to be read as providing for a review of the earlier order rejecting the application or providing for a reference for adjudication to the Industrial Tribunal. Any interpretation to the contrary will result into a situation wherein a forum which is created under the sub-section will be denied to the parties, on the government repeating its earlier decision as a suo moto review. When the

fundamental right to carry on business or profession is restricted, an appropriate remedy has to be provided along with such a restriction and when the same is provided in the statue, it will have to be read as a mandatory requirement, otherwise it will be rendered illusory and ineffective.

12. There is another aspect of the matter. If the submission canvassed by Mr.Buch is accepted, it will result into an initial order rejecting the application and a second order on review confirming the same order and at the same time refusing to refer the controversy for adjudication to the Industrial Tribunal. Now, in which type of situation the appropriate authority should follow this method or refer the matter for adjudication is not provided in the sub-section and the interpretation canvassed by Mr.Buch will lead to an exercise of the power based on caprice and whim of the authority concerned. When will the authority refer the matter for adjudication and when it will not, will be left to the unguided and uncontrolled

discretion of the appropriate authority. Needless to state that this was not what was contemplated when Section 25-O was amended.

13. ..... Mr.Buch very much pressed these observations into service, but what is material to note is that except these passing observations in this paragraph there is no discussion in the entire judgment on this aspect. This paragraph also begins by stating "some arguments have been advanced as to the construction of sub-section (5) of section 25-O". We are not in a position to agree with the above view expressed by the said full Bench and in or view, as indicated above, after proper construction of the relevant section in the light of the judgment of the Supreme Court in the case of Excel Wear (supra), the word "may" appearing in sub-section (5) of Section 25-O of the Act, will have to be read as "shall". That is the only way when an effective remedy can be said to have ben provided to the party aggrieved by the original order of the appropriate

Government".

(emphasis supplied)

l6. In Gwalier Rayons Workers Organization vs State of Kerala, 200l II CLR l77, the Division bench of the Kerala High Court has taken a similar view. In that case the application made by the employer under section 25-O (l) of the Act was rejected by the specified authority. The company sought review of the above order and in the alternative there was a prayer for referring the matter to the industrial tribunal for adjudication. By the impugned order,the specified authority rejected the prayer for review but granted the prayer for referring the matter to an industrial tribunal. The argument of the company was that the specified authority had no jurisdiction to allow the prayer for referring the matter to the industrial tribunal once it had adjudicated on the prayer for review of the order. Rejecting the argument the Court held as follows:

> "On a reading of the above section we are inclined to agree with the view taken by the learned Single Judge. The fact that it is provided under sub-s. (5) that the Government may either review order or refer

the matter to a Tribunal for adjudication would not disable the Government from passing an order referring the matter to a Tribunal for adjudication when it takes the view that there is no reason to review its earlier order refusing the permission for closure. We do not find any contradiction in such a view taken in Ext.P2. It is true that if the Government had taken a decision to allow the petition for review then it may have to rehear the entire issue relating to permission for closure. Under such circumstances it may not be possible for the Government to pass an order referring the matter to a Tribunal for adjudication along with rehearing of the application for closure. In a case as in the present one where the Government has affirmed its earlier view rejecting the prayer for closure there is no illegality or irregularity in the Government granting the alternate prayer for referring the matter to a Tribunal for adjudication."

(emphasis supplied)

l7. We are in respectful agreement with the view

expressed by the Gujarat and the Kerala High Courts that the rejection of the review shall not bar the remedy of having the matter referred to the tribunal for adjudication.

l8 Mr. Singhvi placed heavy reliance upon the decision of a Division Bench of the Madhya Pradesh High Court in Ujjain Mill Mazdoor Sangh and ors vs State of M.P, l999 (I) LLJ ll97 and a Full Bench decision of Delhi High Court in D.C.M. Ltd vs Union of India and ors, AIR l989 Delhi l93. Both these decisions proceed on the basis that the provisions in section 25-0(5) cannot be read to mean that it is obligatory on the appropriate Government to either review its earlier order or make a reference. The word "may" appearing in sub-section (5) of section 25-0 confers discretion on the Government to either review the order or to refer the matter to the tribunal for adjudication. The Government may or may not resort to either option or may take one option. The decisions run counter to the judgment of the Constitution Bench in the case of M/s Orissa Textiles and Steel Ltd where the Court has categorically held that the word "may" will have to be read as "shall" and the appropriate Government is duty bound to review its order upon application made

by the employer or the workmen. Similarly if so required by the employer or the workmen the appropriate Government is required to refer the matter to the tribunal for adjudication . In our opinion these decisions can be no more regarded as good law. Therefore it is not possible to accept the submission of Mr Singhvi that no reference is permissible once the review application is rejected. We are in respectful agreement with the view taken by Gujarat High Court and Kerala High Court that if the appropriate Government is not inclined to review its earlier order, it is expected to refer the matter for adjudication and accordingly we do not find any illegality in the order of the learned single Judge in directing the reference for adjudication.

l9 . In the result the appeal fails and same is dismissed with costs.

. On the request of the learned counsel for the appellant operation of this order is stayed for a period of six weeks.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.693 OF 2004
IN
WRIT PETITION NO.1947 OF 2003

DATE OF DECISION : 5TH APRIL, 2005

For Approval and Signature :

HON'BLE MR.JUSTICE A.P. SHAH

HON'BLE MR.JUSTICE S.J. VAZIFDAR

1. Whether Reporters of Local Papers may be allowed to see the judgement ?)

2. To be referred to be Reporter or not ?)